United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

ORIGINAL

74-1551

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1551

PETER F. CLARK, as President of Ice Cream Drivers and Employees Union Local 757, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, ANTHONY IORIO, as President of Milk Drivers and Dairy Employees Union Local 680, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, PETER F. CLARK, EMANUEL PARISH, ANTHONY CARLINO, RICHARD MASCUCH, ANTHONY IORIO and EDWARD HUTNIK, as Trustees of and on behalf of all of the Trustees of Ice Cream Industry-Drivers and Ice Cream Employees Union Pension Fund, a pension trust fund,

Plaintiffs-Appellees-Appellants,

—against—

KRAFTCO CORPORATION, HERBERT B. ARMEL, EMER C. FLOUNDERS, HARVEY J. FREM, JR., LAWRENCE BAYARD, EDWARD DROZD, LOUIS SCHACHTER and JOHN REISENBERG,

Defendants,

KRAFTCO CORPORATION,

Defendant-Appellant-Appellee.

PLAINTIFFS' REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases

Statute

OTHER AUTHORITIES

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For the Second Circuit

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PLAINTIFFS' REPLY BRIEF

ARGUMENT

I

Finality

The plaintiffs contracted for a final and binding appraisal. Instead the Court below has imposed an arbitration, or quasi-arbitration, upon them. They contracted for the good faith judgment of the actuarial consultant to the Pension Fund, without restriction, and have been told by the Court below that they must have had their own idea of the impact of the Breyer plant closing, and that what must now be sought is the outline of that private, subjective idea.

The plaintiffs did not have any pre-conceptions as to appropriate interest rates, funding methods, appropriate methods of calculating terminated production or distribution employees, retirement rates, or the like. They agreed with Kraftco that both parties would accept the judgment of the impartial appraiser. They have been told by the Court below that they could not have meant to accept the judgment of the appraiser, and the Court below has undertaken to substitute its judgment for the judgment of the appraiser.

Although Kraftco's own actuary acknowledged that the impartial appraiser could have selected any of three methods of calculating impact (210a), the Court below rejected the method originally selected by the appraiser and directed the appraiser to select a different method which it has now confirmed.

Kraftco is still unsatisfied. It asks this Court to reject the second method employed by the appraiser, even though it was the Court-selected method.

The finality bargained for by the parties must prevail. It cries out for enforcement of the appraiser's original determination by this Court.

II

Intent

Kraftco argues that the Segal Company admitted that it was unable to select the method of calculation "which conformed to the intent of the parties" (Kraftco reply brief, p. 3). This argument involves the false assumption that a particular method was intended. The record, which we have attempted to review with care in our main brief, shows no intention to pre-select a particular method.

Kraftco's assertion (*Id.* at p. 2) that the appraiser "ultimately admitted" that the original determination ". . . had no support in the contract language (115a)," is inaccurate. What the Report stated is that the Breyer Agreement did not show that any specific method of calculation was intended.

> "By arguing for the original appraisal, the Plaintiff is contending for an interpretation of the Agreement that would accomplish precisely the result the Defendant objects to. From that point of view, the [original] Segal calculation was the only one that could have been made. The Defendant's position is that this could not have been intended by Kraftco. In any event, the Agreement does not provide explicit guidance for a resolution of this particular issue." (115a).

What the appraiser quite appropriately did was to select the method which it considered reasonable:

> "The Actuary finds that the Segal Company calculation was based on a reasonable method of giving effect to the Agreement." (114a).

The Appraiser by selecting the method which it considered reasonable, rather than by attempting to guess the preconceptions of the parties, truly carried out the intent of the Breyer Agreement.

III

Funding

Kraftco argues on the unsupported assumption that the Breyer Agreement was ambiguous (Kraftco reply brief, pp. 4 *et seq.*). That assumption is not founded on the language of the Breyer Agreement or upon any objective evidence in the record.

Kraftco may have misled the Court below by its various references to the funding method allegedly adopted by the Trustees. But funding means only the manner in which a debtor distributes his income to pay off his debt. It does not change the amount of his income or the amount of his debt.

Kraftco argues that although by closing the Breyer Plant it reduced the Fund's income (fewer covered employees upon whose hours of work contributions are based) and increased its debt (longer retirement periods due to earlier retirement), this should be disregarded or discounted because the Trustees had not yet decided to amortize their debt.* It is unfortunate that this specious argument apparently misled the Court below. The funding method is totally irrelevant to consideration of the impact of the Breyer plant closing.

IV

Prejudice

Kraftco shamelessly seeks to slander the appraiser and prejudice the Court:

> "As actuarial consultants to the Pension Fund, the Segal Company stood in such a relationship to it

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* The Employee Retirement Income Security Act of 1974 (H.R. 2, 93 Cong. 2d Sess.) was signed by President Ford on September 2, 1974. It mandates at least 40 year funding for pension funds in existence on January 1, 1974 for plan years beginning after December 31, 1975 (Sections 301-306).

> that, if vested with such discretion, the likelihood that it would exercise it against the interests of Kraftco would have been too great." (Kraftco reply brief, p. 9)

There is nothing in the record to justify this. It has been stipulated and found by the Court below that the record is untainted by misconduct (137a, fn. 8 at 245a). Kraftco's allegation is baseless. It should be disregarded.

V

Judgmental Questions

Kraftco argues that the appraiser included in its calculations distribution employees who were laid off at the closing of the Breyer plant whereas only production employees should have been counted.* The record shows that in making its original determination the Segal Company sought and obtained all the information it considered relevant with respect to affected employees from the Fund Man-

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* Kraftco contended to the same effect at trial that:

> "If the Court were to hold that the original Segal Company calculation, or the alternate calculation set out in its determination pursuant to Judge Tyler's order, was consistent with the intent of the parties to the Breyer Agreement, then Kraftco would contend
>
> (a) that the Court has the power to review either calculation for reasonable correctness, and
>
> (b) that, taken on their own assumptions there are errors in each calculation of such nature that the Court should correct them." (Pretrial Order, pp. 12-13).

Inasmuch as the contention has been addressed to the original determination, which is the subject of plaintiffs' cross-appeal, as well as to the second determination and would in any event apply equally to the original determination, a reply would appear to be appropriate. In the event the Court finds that this aspect of plaintiffs' reply may not be considered except by leave granted pursuant to Rule 28(c) of the Federal Rules of Appellate Procedure, plaintiffs respectfully request that such leave be granted.

ager (307a, 308a, 329a). Information was also requested of Kraftco and was forwarded to the Segal Company by Attorney Aaron Solomon on behalf of Kraftco (306a, 334a). The interpretation of this data was a judgmental matter involving the predicted income of the Fund. It was peculiarly within the province of the Fund's actuarial consultants.

Kraftco submitted the affidavit of its actuary, Preston Bassett, to Judge Tyler in which he made the same contention Kraftco now makes (83a). In the Report which reaffirmed the reasonableness of the original determination and set forth the alternate calculation the appraiser considered the contentions in the Bassett affidavit (114a footnote). There is no valid basis for Kraftco now to second-guess the appraiser. Such a judgmental matter cannot be equated with the mere mechanical "miscalculation of figures" referred to in the New York CPLR. Judgmental matters remain solely within the province of the arbitrator. In *Morris White Fashions, Inc.* v. *Susquehanna Mills, Inc.*, 295 N.Y. 450, 68 N.E.2d 437 (1946), the New York Court of Appeals refused to modify an award under the predecessor to Section 7511(c) because,

> "There was no error of computation unrelated to any exercise of judgment or discretion." (295 N.Y. at p. 456, 68 N.E. 2d at p. 440)

Weiss v. *Metalsalts Corporation*, 15 A.D.2d 46, 222 N.Y.S. 2d 7 (1st Dept. 1961), *aff'd*, 11 N.Y.2d 1042, 230 N.Y.S.2d 32 (1962), cited at page 19 of Kraftco's reply brief, involved the question of a mere mechanical error of calculation. *Fudickar* v. *Guardian Mutual Life Insurance Co.*, 62 N.Y. 392 (1875), cited at page 19 of Kraftco's reply brief as *Fudickar* v. *Canadian Mutual Life Ins. Co.*, is no longer law. It has been described as overruled. 1973-1974 Sup-

lement to 7B *McKinney's Consolidated Laws of New York Annotated*, p. 225. The New York Court of Appeals has stated that:

> ". . . contrary to statements contained in *Fudickar* v. *Guardian Mutual Life Ins. Co.*, 62 N.Y. 392—upon which reliance is placed—an award will not be set aside even '[i]f it appear upon [its] face * * * that the arbitrators intended to decide the case according to the law, and the grounds for their decision are set out, which in law do not justify it' (p. 401)." *Schine Enterprises, Inc.* v. *Real Estate Portfolio of New York, Inc.*, 26 N.Y. 2d 799, 309 N.Y.S. 2d 222, 223 (1970).

VI

Injury

Kraftco argues at page 6 of its reply brief that the Pension Fund's ". . . obligations to all pensioners ($8,600,000) was fully covered by its assets ($10,400,000)". This is a specious argument. Damages are not measured by the wealth of the injured party. They are measured solely by the injury. The Breyer Agreement did not require and it was not necessary for the plaintiffs to establish that the Pension Fund would be bankrupted by the plant closing in order to recover damages.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the plaintiffs' main brief, the plaintiffs' appeal should be granted and judgment should be entered in their favor for the sum of $978,100.00 plus interest from November 2, 1968, calculated in accordance with footnote 9 to Judge Lumbard's Opinion and Order.

Respectfully submitted,

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September 12, 1974

Service of three (3) copies of the within

brief is hereby admitted

this 12th day of September 1974

Sullivan & Cromwell

Attorney(s) for Appellant